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No. 262

In the Supreme Court of the United States

OCTOBER TERM, 1952

CALMAR STEAMSHIP CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the District Court for the Southern District of New York (R. 700-756) is reported at 103 F. Supp. 243. The opinion of the Court of Appeals for the Second Circuit (R. 792-804) is reported at 197 F. 2d 795.

JURISDICTION

The judgment of the Court of Appeals was entered on May 12, 1952 (R. 804-5). The petition for a writ of certiorari, filed on August 7, 1952, was

granted on October 20, 1952 (R. 822). The jurisdiction of this Court rests upon 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether a privately owned, manned, and operated merchant cargo carrier chartered to the United States, in November 1941, for a voyage to the Philippines (and return) for the carriage of "lawful merchandise" in "lawful trade," and carrying military equipment and supplies, was "employed as a merchant vessel" within the meaning of Section 2 of the Suits in Admiralty Act, so as to confer jurisdiction upon the district court, or whether the owner's suit for additional charter hire and other claims based upon the charter could be brought only in the Court of Claims.

STATUTES INVOLVED

The pertinent provisions of the Shipping Act of 1916, the Suits in Admiralty Act, and the Public Vessels Act, are set forth in the Appendix, pp. 40-43.

STATEMENT

The Federal Government, through the Maritime Commission, and Calmar Steamship Corporation (hereafter termed Calmar) entered into a charter as of November 21, 1941, on a time charter party form numbered MCc 1915, for the use of the cargo-carrying space of *SS Portmar* to transport cargo ("for trading", Art. 1.01, R. 19) on one round voyage from United States West Coast ports to the Philippine Islands and return to United States East Coast ports (R. 18*ff*, 703*ff*). This was done under the authority of Section 3(a) of the Act of

June 6, 1941, P.L. 101, 77th Cong., 1st Sess., 55 Stat. 242, 243, authorizing the Commission to charter vessels if necessary to transport foreign commerce or commodities essential to the national defense (see R. 19). The *Portmar* was a general cargo carrier and had always been used for that purpose by her owner (R. 160, 743).[1]

The time charter (R. 18-38) left the vessel in the owner's possession and control, and provided for payment of charter hire at $4.70 per ton per month and of victualling charges for extra personnel the charterer required to be on board. The owner was to pay all wages of the master, officers and crew. The charter specified that the vessel was not demised to the charterer (Art. 2.21, R. 36) and stated that "The Vessel shall be employed in carrying lawful merchandise, * * * in lawful trades within the trading limits of this Charter, as the Charterer or its agents shall direct" (Art. 2.01, R. 22).

The owner was to take out and the United States to pay the premiums for war risk insurance unless the Government elected to supply such insurance. The vessel did not have to sail until the insurance had been placed (Art. 2.17, R. 35). The United States, as charterer, agreed to indemnify Calmar against the consequences of following the charterer's orders (Art. 2.11, R. 29). Hire was payable until the vessel was redelivered or was actually or constructively lost (Art. 2.03, R. 22-23). Calmar

[1] She was included as a steam vessel in the official list of *Merchant Vessels of the United States, 1942* (p. 51).

took out war risk insurance with Lloyds underwriters and obtained the Government's agreement to pay the premiums (R. 709-715).

Between November 23 and November 27, 1941, the vessel was loaded by Army stevedores with military materiel, including high octane gasoline, ammunition and military equipment, for carriage to Manila and delivery to the Army (R. 275-6, 715). The manifest was not given to the master, but was kept by a sergeant placed on board as supercargo (R. 276-277, 451, 523-5, 716).

The *Portmar* sailed from San Francisco, November 28, 1941, and followed her secret Navy routing orders [2] until the master learned of the outbreak of war with Japan on December 7, 1941 (R. 716). She then turned south and proceeded to a point six hundred miles south of her naval route where she received naval orders to put into Suva in the Fijis. At Suva, the Navy ordered her to proceed to Sydney, Australia. On arrival at Sydney on December 30, one of her Army supercargoes delivered her manifest to American Army officers. The Australian Naval authorities then ordered her to proceed to Brisbane. At Brisbane, the Army ordered the cargo unloaded, sorted and checked. Thereafter, the major part was reloaded on the *Portmar* with some additional cargo. She then proceeded under Army orders, transmitted through Australian Naval control, to Port Darwin where

[2] These routing orders were the customary naval routing orders issued to all American flag cargo vessels during the emergency, regardless of ownership or charter arrangements (R. 100, 716).

she discharged the bulk of her cargo. On Army orders, she next carried two thousand drums of gasoline to Wyndham. Upon her return to Port Darwin on February 12, 1942, on Army orders, she loaded artillery, military equipment and men and proceeded in convoy to Koepang, on the island of Timor, but following Japanese bombing returned to Port Darwin where she suffered extensive damage and was beached to prevent sinking. (R. 717 *et seq.*). She was finally towed to Brisbane and, while repairs were in progress, she was requisitioned by the Government on November 17, 1942 (R. 625, 738).

The Government paid charter hire in full for the period ending February 19, 1942, when the vessel was beached and abandoned as a constructive total loss, with the exception of a small sum payable for victualling the supercargoes (R. 742).

On February 11, 1944, petitioner Calmar sued the United States under the Suits in Admiralty Act, 46 U.S.C. 741-742, *infra*, pp. 40-42, for additional charter hire for the period from February 19, 1942, to November 17, 1942, for allegedly causing invalidity of the insurance and for the damage sustained in the Japanese attacks as a result of compliance with military orders (R. 5-18). The Government objected to the jurisdiction of the court on the ground that the *Portmar* was not "employed as a merchant vessel" within the proviso of Section 2 of the Suits in Admiralty Act, 46 U.S.C. 742, *infra*, p. 41, and that therefore the suit should have been brought in the Court of Claims

(R. 701). It denied liability for the additional hire on the grounds that the vessel had become a constructive total loss on February 19, 1942, that by the terms of the charter the charterer's obligation to pay hire terminated on actual or constructive loss, and that the owner had elected to treat the charter as terminated after the Japanese attack on February 19, 1942, and also that the voyage had been frustrated (R. 701-2). It denied any liability for invalidation of the insurance and for partial loss from attack, for the former because the insurance had not been invalidated, for the latter on the ground that any losses had not resulted from orders given by the Government as charterer within the meaning of the charter or by any action for which the Government agreed to be liable, but had resulted from war risks assumed by the owner (R. 701). Calmar conceded that the claims against the United States for the charter hire and indemnities were largely alternative to the claim against the war risk underwriters (R. 703).

By stipulation, Calmar's suit against the United States was tried together with its suit against the underwriters, which was brought on November 10, 1944 (R. 45*ff*), and is the subject of No. 303, this Term, *Calmar Steamship Corp.* v. *Scott*. One opinion was written (R. 700-756) but separate decrees were entered (R. 765-768, 777). The District Court held that it had jurisdiction over the claims asserted against the United States because the *Portmar* was "employed as a merchant vessel"

within the meaning of the statute. It stressed operation by the owner with its own crew, the fact that the vessel was not demised to the Government, and her charter for trading. (R. 742-744). "Public service did not alter the merchant character of the vessel * * *" (R. 744). However, inasmuch as the underwriters were held liable, the United States was held responsible only for $238.50 for the victualling of the three supercargoes it required on board, with interest (R. 756, 777).

The underwriters appealed the decision against them and the United States appealed on the jurisdictional point (R. 782-4). In the Court of Appeals, where the appeals proceeded on a single record, it was held that the frustration of the insured voyage released the underwriters and necessitated reversal of the decree against them (R. 792-802); and that because of the nature of its cargo the *Portmar* was not "employed as a merchant vessel," and therefore that the District Court was without jurisdiction to enter any judgment whatsoever against the United States (R. 802-804).

SUMMARY OF ARGUMENT

I

Although the view of the Court of Appeals—that the military character of the cargo on the privately-operated vessel *Portmar* precluded employment as a merchant vessel, in the sense of the Suits in Admiralty Act—was urged by government counsel in the proceedings below and has some support, on further consideration the Government

submits that the view that jurisdiction existed under the Suits in Admiralty Act is better grounded and would prove more beneficial both to the Government and prospective plaintiffs.

A. For vessels operated *by* the United States, the nature of the cargo has determined whether suit lies under the Suits in Admiralty Act (covering ships "employed as a merchant vessel") or the Public Vessels Act (covering a "public vessel of the United States"). The test, originating in *The Western Maid*, 257 U.S. 419, has been applied in subsequent cases, in each of which the United States operated the vessel, and the unsuccessful plaintiff understandably regarded the cargo as the one element favorable to establishing employment as a merchant vessel.

In cases like that at bar, however, where the vessel was privately operated *for* the United States, and the Public Vessels Act would rarely, if ever, be available, we suggest that the cargo test should not be applied. As we show in detail in Points I, B, and C, the Suits in Admiralty Act does not in terms require that the nature of the cargo determine the classification of a vessel operated by a private party for the United States, and the reasons for resolving the ambiguity in the statute in favor of admiralty jurisdiction are persuasive. The frequent uncertainty of maritime litigants as to the Act under which they should proceed and the forum in which they should file suit will be minimized if jurisdiction under the Suits in Admiralty Act is sustained, and this result is con-

sistent with the terms and basic theory of the Act.

B. The main arguments for sustaining Suits in Admiralty Act jurisdiction are the burdensome consequences of denying it. The nature-of-the-cargo test is often far from simple in application. Assuming that the libelant has access to the manifest characterization as military or non-military (in order to forecast the appropriate jurisdictional basis) may require consideration of the kind of goods, their use, the identity of the consignee, and other factors. Moreover, cargo may be mixed or it may be changed during the course of the voyage or the running of the charter. While undergoing repairs, the vessel may be without any cargo at all.

Comparable problems may arise when a vessel operated *by* the United States has to be classified as a "public vessel" or "employed as a merchant vessel", but for that purpose the choice is between complementary sources of jurisdiction in the same federal District Court and plaintiffs may take precautions by filing two suits or pleading in the alternative. Where the choice, as here, is between jurisdiction in the Court of Claims or in the District Court under the Suits in Admiralty Act, that course is rendered impossible by 28 U.S.C. 1500, prohibiting the simultaneous prosecution of a suit in the Court of Claims where the claim against the United States is in litigation in another court. The impossibility of maintaining concurrent suits may then be responsible for unfortunate pitfalls. When the waiver of sovereign immunity is itself unquestioned, an approach

avoiding hardships and binding elections is preferable to one causing needless hardships solely because of the excusable uncertainty of counsel as to the jurisdictional basis for the claim. Cf. *Davis* v. *Department of Labor,* 317 U.S. 249, 254.

Construing the Suits in Admiralty Act to permit suits of this character channels essentially maritime litigation to the District Courts which are familiar with maritime law and which also have flexible procedures to promote the interests of the parties and avoid hardships. Although the Suits in Admiralty and Public Vessels Acts are not phrased in complementary terms, they form and were designed to form an integrated functional system for receiving litigation resulting from the operation of vessels by or for the United States. It would be anomalous, and an indication that the purpose of Congress had failed, if vessels operated *for* the United States, and carrying military or public cargo, are outside the system's joint coverage. Moreover, the immediate purpose of the enactment of the Suits in Admiralty Act—*i.e.* immunization of vessels from the seizure which had been held permissible under the Shipping Act of 1916 (*The Lake Monroe,* 250 U.S. 246)—may well be defeated by the construction that the important class of privately-owned vessels operated for the Government, and carrying military cargo, falls outside the unified system afforded by the two Acts. Even the outside possibility that such vessels may be liable to arrest or seizure strongly argues against the soundness of an interpretation deny-

ing jurisdiction under the Suits in Admiralty Act, and underscores the advantages of having jurisdiction in the District Court.

C. The Suits-in Admiralty Act has been given hospitable scope in the decisions of this Court and, where applicable, has been held to furnish the exclusive remedy on maritime causes of action. As we interpret the course of these decisions, maritime suits against the United States involving merchant vessels are to be concentrated in the federal District Courts to the extent possible, and what constitutes "employment as a merchant vessel" is not to be read too narrowly. The "merchant vessel" proviso to Section 2 of the Suits in Admiralty Act (*infra*, p. 41) is not being stretched beyond recognition when it is construed to cover cargo vessels privately operated for the United States under time charters, regardless of the nature of the cargo; when the United States pays hire to an owner for carrying cargo it appears to be quite accurate to describe the vessel as "employed as a merchant vessel." Nothing we have found in the legislative history detracts from this conclusion.

The *Portmar* herself was a general cargo carrier and had always been in the merchant service. That she retained her general character as a merchant vessel may be said without impropriety and appears to fall within the rules laid down in *Shewan & Sons* v. *United States*, 266 U. S. 108, 113 and *Eastern Transp. Co.* v. *United States*, 272 U. S. 675, 692.

The Western Maid, 257 U. S. 419, and the later

cases on which the Court of Appeals relied are not inconsistent; they involved public vessels operated *by* the United States, rather than ships privately-owned and privately-operated as cargo carriers *for* the United States, and in *The Western Maid*, the Court did not have to construe the Suits in Admiralty Act but Section 9 of the 1916 Act (*infra*, p. 40) which authorized seizure of vessels employed *solely* as merchant vessels. Interference with the performance of vital governmental functions was the possibility that had to be faced in that case, since there was no alternative to seizure under the 1916 Act. This possibility no longer exists where the Suits in Admiralty Act is held applicable, since the Act provides a substitute for seizure. On balance, taking full account of the purposes of the Suits in Admiralty Act and the undesirable consequences of denying jurisdiction, we submit that the Suits in Admiralty Act supports jurisdiction here.

II

Petitioner Calmar presses the liability of the United States provisionally and in the alternative, primarily to deal with the contingency that it may be unable to recover from the underwriters in *Calmar Steamship Corporation* v. *Scott*, No. 303, this Term. The liability of the United States to petitioner is complex and involved. It is reached only if this Court fully adjudicates the claim against the underwriters in the latter's favor and if Suits in Admiralty Act jurisdiction over the instant suit is sustained. Inasmuch as the courts below had no

occasion to consider the questions of government liability extensively, we submit that in the event the liability of the United States is reached, the Court remand the case for further proceedings.

ARGUMENT

I.

The District Court Had Jurisdiction Under the Suits in Admiralty Act

The Court of Appeals held that the Suits in Admiralty Act (*infra*, pp. 40-42) did not apply because the military character of the *Portmar's* cargo on the outward leg of the never-completed round trip voyage showed that the vessel was not "employed as a merchant vessel." This holding was rested on the character of the cargo, although the court recognized that the ship was privately operated by petitioner "for the United States", within the meaning of the Suits in Admiralty Act, with a crew of privately employed merchant seamen, under a voyage charter for the carriage of "lawful merchandise" in "lawful trades", making provision for the issuance of bills of lading (Arts. 2.11, 2.15, R. 28, 30-34).[3]

There has been, for some time, a difference of

[3] In the emergency and war period beginning in 1939-1940, the Government frequently time-chartered privately owned vessels, with private crew. See *Hust* v. *Moore-McCormack Lines*, 328 U.S. 707, 710-11.

If otherwise applicable, the Suits in Admiralty Act admittedly covers vessels time-chartered by the United States, since such vessels are operated "for the United States". *Burkholder* v. *United States*, 60 F. Supp. 700, 703 (E.D. Pa.); *Pineiro* v. *United States*, 65 F. Supp. 191 (N.D. Calif.); *Epstein* v. *United States*, 86 F. Supp. 740 (S.D.N.Y.); *A. H. Bull SS Co.* v. *United States*, 105 F. Supp. 474, 479 (S.D.N.Y.).

opinion within the Department of Justice over whether the Suits in Admiralty Act covers vessels of merchant type, privately operated "for the United States", when they carry military cargo. In the proceedings below, Government counsel, who were of the view that the Act did not apply, urged that position upon the District Court, unsuccessfully, and then with success upon the Court of Appeals. After further consideration, the Government takes the position in this Court that the Act grants jurisdiction to the District Court in these circumstances, but we do so with hesitation because the choice of interpretation is not automatic and there is support for both views. On the whole, however, we conclude that the preferable interpretation is contrary to that of the Court of Appeals; the aids to interpretation point to the broader reading and we believe that such a construction will be in the best interests of both the Government and potential plaintiffs.

A. *The rationale of the Court of Appeals' view.*

The argument in support of the decision below is quite simple. Admittedly, where a vessel is owned or operated *by* the United States, the nature of the cargo is a test of the employment of the vessel and thus of whether suit lies under the Suits in Admiralty Act, or under the Public Vessels Act (if the latter statute is otherwise applicable). In *The Western Maid*, 257 U. S. 419, the grandfather of the rule, the three vessels were all transports owned or bareboat chartered for public purposes by the United States, publicly operated with service

crews, and thus fully qualified as "public vessels." The *Liberty* was commissioned as a Naval dispatch boat and had a Navy crew; the *Carolinian* had been used as an Army transport and had an Army crew. The question as to the *Western Maid* itself was whether a transport owned by the United States and publicly operated by the United States with a Navy crew, loaded with foodstuffs for civilians abroad as a constituent of activity in the First World War, was "employed solely as a merchant vessel", and so could be seized (under Section 9 of the 1916 Shipping Act, *infra*, p. 40, and the ruling in *The Lake Monroe*, 250 U. S. 246) in a suit by the collision victim. The Court held that all the vessels were employed "for public and government purposes", and that, in the case of the *Western Maid*, her cargo of foodstuffs was concerned with the war effort and "had no more to do with ordinary merchandizing than if she had carried a regiment of troops". 257 U. S. at 431-2.

Of the other cases relied on below (R. 803), *Bradey* v. *United States*, 151 F. 2d 742 (C.A. 2), certiorari denied, 326 U. S. 795, rehearing denied, 328 U. S. 880, held that the *John Morton*, a vessel owned and operated by the United States, with a civilian crew employed by the War Shipping Administration and bound with coal for the Army for Newport News where she was to complete her cargo by loading munitions of war for carriage to the European theatre of war, was employed solely as a public, not as a merchant vessel. The remaining cases also involved govern-

ment-owned or bareboat chartered ships which were publicly operated. *United States* v. *City of New York*, 8 F. 2d 270 (S.D. N.Y.), involved the *Waubesa*, owned by the United States and engaged in the European relief service. In *The Norman Bridge*, 290 Fed. 575, 578 (S.D. N.Y.), modified on other grounds, 13 F. 2d 435 (C.A. 2), the vessel was bareboat chartered to and operated by the United States and was carrying fuel to the British in September 1918 "to enable one of [the] associate belligerents to continue the war," and it was held that, not being "employed solely as a merchant vessel," she could not be subjected to a lien. In each case the decision was predicated on *The Western Maid*, 257 U. S. 419. *United States Grain Corp.* v. *Phillips*, 261 U. S. 106, 111, involving a claim for a commission on gold carried on a Navy destroyer, also followed *The Western Maid*, in declaring that the supply of food to foreign civilians after World War I was a "public function" and not "ordinary merchandizing". In these cases, the operation of the vessel was in the United States, and the unsuccessful party plaintiff looked upon the cargo as the one element possibly favorable to establishing "employment as a merchant vessel". The courts held, however, that the cargo did not bring the ships within the category of public vessels "employed as merchant vessels."

Since the nature of the cargo is clearly a test of "employment as a merchant vessel" in cases in which the vessel is owned or operated *by* the United States, it might of course be said, as the Court of

Appeals held, that the same test should be used where the vessel is operated *for* the United States. Inquiry into the cargo is often made in the first class of cases, and it is not an unusual or novel undertaking. In many instances this test can be readily applied, and where there are difficulties (see *infra*, pp. 19-20), they are not too different from those already encountered in delimiting the employment of Government-owned or Government-operated vessels as solely merchant or as public. In those cases in which its cargo precludes a "merchant vessel" operated *for* the United States from being classified as "employed as a merchant vessel", suit would have to be brought, if there is jurisdiction at all, in the Court of Claims under the Tucker Act or in the District Courts under the Tucker or Tort Claims Act. The Public Vessels Act (*infra*, pp. 42-43) would rarely, if ever, be available since to be "a public vessel of the United States" a ship must ordinarily be operated *by* the United States. See H. Rep. No. 913, 68th Cong., 1st Sess., p. 1.

However, despite the *The Western Maid*, 257 U. S. 419, and its progeny, we suggest that the cargo test should not be extended to the determination of whether a "merchant vessel" operated *for* the United States is "employed as a merchant vessel." The terms of the Suits in Admiralty Act do not require, in and of themselves, that the nature of the cargo be determinative of the classification of the employment of a vessel operated by a private party for the United States, and there are weighty rea-

sons why the cargo test should not be used and why the ambiguity in the statute should be resolved in favor of admiralty jurisdiction. Maritime litigants—who may be owners, seamen, collision victims—are frequently confronted with dilemmas as to the Act under which they are to proceed and the forum in which they are to file suit.[4] In the case of a privately-operated ship carrying cargo for the United States, these difficulties may be minimized, we believe, by sustaining jurisdiction under the Suits in Admiralty Act regardless of the type or nature of the particular cargo. And it is not hard to accept this view since the basic theory, as well as the words of the Act, can quite naturally cover this class of cases.

B. *Grounds for sustaining jurisdiction under the Suits in Admiralty Act.*

1. *Comparative advantages of jurisdiction under the Suits in Admiralty Act.* The main argu-

[4] See H. Rep. No. 2572, 77th Cong., 2d Sess., p. 9 (quoted in *Hust* v. *Moore-McCormack Lines*, 328 U.S. 707, 726): "Present-day operating conditions often make uncertain whether the vessel is a merchant or a public vessel." And see Justice Reed, dissenting, 328 U.S. at 741: "When the War Shipping Administration became the operator of practically the entire American merchant marine, doubts sometimes arose as to whether a particular vessel was a 'merchant' vessel, operated by the United States or not." Cf. *The Florence H*, 248 Fed. 1012 (S.D. N.Y.); Testimony of Judge Charles M. Hough, Hearing before House Committee on the Judiciary, 68th Cong., 1st Sess., on H. R. 9075, May 21, 1924, p. 5; *Responsibility of the United States on Maritime Claims Arising out of the Operation of Government-Owned Vessels*, 39 Yale L. J. 1189, 1192 (June 1930); E. M. Borchard, *What Is a "Merchant Vessel"?* 23 Am. J. Int. Law 391; *The Maritime Liability of the United States*, 100 Univ. Pa. L. Rev. 689, 696 (March 1952).

ments for upholding suit under the Suits in Admiralty Act are a reflection of the burdensome consequences of a denial of jurisdiction, consequences which we shall now consider.

(a). First, the nature-of-the-cargo test may be far from simple in application. The libelant may not have access, particularly in wartime, to the manifest. See *supra*, p. 4. The characterization of the cargo as military or non-military, public and commercial, may be quite complex, since consideration has to be given to the kind of goods, their intended use, the identity and location of the consignee, as well as other factors. Cf. *United States* v. *Powell*, 330 U. S. 238; *Northern Pacific R. Co.* v. *United States*, 330 U. S. 248. Cargo may be mixed in type (i.e., both "military" and "mercantile") and thus raise questions as to which class is dominant.[5] In tort cases these problems, though they exist, would be relatively simple in most cases because the test would probably be the nature of the cargo at the time of the tort.

With respect to contractual claims, however, there would be not only the foregoing problems but also those flowing from changes of cargo in the course of one voyage, or from voyage to voyage.

[5] A shipper whose goods are carried on a vessel operated for the United States and carrying mixed cargo clearly should be able to sue under the Suits in Admiralty Act which, unlike Section 9 of the Act of September 7, 1916, 39 Stat. 730, 46 U.S.C. 808, does not speak in terms of employment *solely* as a merchant vessel. For such a shipper, the vessel is basically carrying cargo for hire and is therefore a merchant vessel. In a collision case it might be necessary to determine which service was paramount. Cf. *The Hamburg*, 298 Fed. 942 (S.D. N.Y.).

during the running of a charter. For instance, a vessel chartered by the Government has frequently carried military or lend-lease cargoes outbound and commercial cargo inbound, and similar change-overs occur as between voyages. In those cases, such questions would arise as to whether one type of cargo was dominant and the other incidental, or what weight is to be given to the connection of the particular cargo with the particular claim.[6] If the particular cargo is important, there will also be problems where a "merchant vessel" is being reconditioned, repaired, or converted, and is therefore not carrying any cargo at all.[7]

This factor of the complexity of determining the nature-of-the-cargo should have considerable weight. See *Thomason* v. *United States*, 184 F. 2d 105, 108 (C.A. 9). Jurisdictional questions that must be resolved at the threshhold should normally be simple and inexpensive to determine, and not such as to require resort to discovery—particularly discovery which may affect questions of security such as disclosure of a vessel's manifest in wartime. If the determination is prohibitive in cost or effort, it hardly lends itself to preliminary determination.

(b). Comparable problems arise, it is true, when a vessel operated *by* the United States has to be classified as "employed as a merchant

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[6] In the instant case, for example, petitioner is claiming for obligations arising after the discharge of the military cargo loaded in Oakland.

[7] Cf. *Eastern SS Lines* v. *United States*, 187 F. 2d 956 (C.A. 1); *Adams* v. *United States*, 281 Fed. 895 (D. Mass.); *The Augusta G. Hilton*, 3 F. 2d 808 (D. N.J.), affirmed, 13 F. 2d 354 (C.A. 3).

vessel" or employed solely as a public vessel. But in those circumstances the choice is ordinarily between two complementary sources of jurisdiction of the same federal District Court—the Public Vessels Act or the Suits in Admiralty Act—and the difficulties of choosing the wrong forum are diminished to possible differences in venue. Here, the classification probably entails a difference in courts—the District Court or the Court of Claims—and the burdens of choice are that much greater.

For one thing, plaintiffs cannot cautiously hedge by maintaining two suits at the same time or invoking jurisdiction in the alternative, as they may when the choice is between the Suits in Admiralty and the Public Vessels Acts. For litigants can no longer protect their rights by suing under the the Tucker Act in the Court of Claims and under the Suits in Admiralty Act in the District Court, now that 28 U.S.C. 1500[8] prohibits the simultaneous prosecution of a suit in the Court of Claims where the claim against the United States is in litigation in another court. Plaintiffs may, therefore, have to proceed at their peril, sometimes, as here, without prior knowledge of the nature of the cargo. Since no general provision

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[8] "The Court of Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States."

See Brief for the United States in *De La Rama SS Co.* v. *United States*, No. 368, this Term, pp. 23-24.

for the transfer of cases between these courts exists[9], and concurrent suits, as prudence would otherwise dictate, is a refuge specifically denied by 28 U.S.C. 1500, unfortunate pitfalls are a probable concomitant of apportioning jurisdiction on the basis of cargo-type to the Court of Claims, which has no jurisdiction under the Suits in Admiralty Act,[10] and where suits must be dismissed unless pleadings negative employment as a merchant vessel. *Matson Navigation Co.* v. *United States*, 284 U.S. 352, 359.

This inability to take precautions is worthy of serious consideration along with the difficulty of determining the character of a vessel's employment by its cargo. Whatever the abstract attraction of the competing jurisdictional solutions may be, when, as here, the waiver of sovereign immunity is itself beyond controversy, a pragmatic approach avoiding hardships, inconveniences, binding elections to sue in the wrong forum, and the expense of an unrewarding inquiry into jurisdictional facts, is preferable to a solution that may inflict needless hardships solely on account of the excusable misapprehensions of counsel as to the jurisdictional

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[9] *De La Rama SS Co.* v. *United States*, 198 F. 2d 182 (C.A. 2), now on writ of certiorari, No. 368, this Term; *Walsh* v. *United States*, 105 F. Supp. 816 (E.D. Pa.); *Bare* v. *United States*, 107 F. Supp. 551 (M.D. Pa.). Cf. Section 37 of the Act of June 25, 1948, 62 Stat. 869, 992, providing for such transfer under the War Contract Hardship Claims Act; *American Const. Co.* v. *United States*, 107 F. Supp. 858, 862 (C. Cls.).

[10] *Sanday & Co.* v. *United States*, 76 C. Cls. 370.

basis for the claim. Cf. *Davis* v. *Department of Labor*, 317 U.S. 249, 254.[11]

Moreover, the difference in the statutes of limitations under the Tucker Act (six years, 28 U.S.C. 2501) and the Suits in Admiralty Act (two years, 46 U.S.C. 745) brings forth other reasons for centering actions under the latter statute where possible. Plaintiffs with similar or nearly identical causes of action would have different periods in which to sue, a result to be avoided. See *Thomason* v. *United States*, 184 F. 2d 105, 108 (C.A. 9); *Federal Sugar Refining Co.* v. *United States*, 30 F. 2d 254 (C.A. 2), reversed on other grounds, 280 U.S. 320; *Angfartygsaktiebolaget Tirfing* v. *United States*, 70 C. Cls. 251, 260. Also, a litigant may be encouraged to proceed in the forum where he has six years, and the chances are therefore multiplied that he will discover that in addition to the delay and expenses of litigation "his claim has been barred by the statute of limitations in the proper forum while he was erroneously pursuing it elsewhere." See *Davis* v. *Department of Labor*, 317 U.S. 249, 254.[12]

(c). On the other hand, substantial advantages spring from construing the Suits in Admiralty Act to permit District Court actions in all admiralty

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[11] The modern tendency is to relieve parties of perilous elections when they may not be fully advised and are in a genuine quandary as to how to proceed.

[12] Shorter periods of limitation reduce the difficulties of locating witnesses and have the effect of assuring trial on fresher oral testimony rather than on depositions taken years later. The libel in this case was filed on February 11, 1944 (R. 1).

cases such as this. That solution channels essentially maritime litigation to the District Courts, where admiralty and maritime cases are daily tried; where the jurisdictional bases may be pleaded in the alternative;[13] where transfers from one side of the court to the other are possible, as are transfers from one district to another; where the suit may be maintained alternatively under the Suits in Admiralty Act, the Public Vessels Act, the Tort Claims Act, or the Tucker Act (on claims not exceeding $10,000), thus mitigating the rigors of exclusive jurisdiction; and where specialization and expertise in the body of maritime law may be drawn upon[14] and uniformity in the rules of decision and procedure in maritime matters may be achieved.[15] It is also frequently advantageous to have closely related or interdependent private litigation, such as that between Calmar and its underwriters in No. 303, this Term, consolidated for trial with a suit against the United States, so

[13] Cf. *Ryan Stevedoring Co.* v. *United States*, 175 F. 2d 490 (C.A. 2), certiorari denied, 338 U.S. 899; *Conners Marine Co.* v. *Petterson Lighterage & Towing Corp.*, 60 F. Supp. 960, 961 (S.D. N.Y.).

[14] The bulk of the law maritime has been evolved in litigation to which the United States was not a party.

[15] See *U. S. Shipping Bd. Emergency Fleet Corp.* v. *Rosenberg Bros.*, 276 U.S. 202, 213; *Johnson* v. *Fleet Corp.*, 280 U.S. 320, 327; *Matson Navigation Co.* v. *United States*, 284 U.S. 353; *Thomason* v. *United States*, 184 F. 2d 105 (C.A. 9).

The usual charter party is maritime. A shipowner who operates a vessel for the Government under charter has a claim within the admiralty jurisdiction. *Matson Navigation Co.* v. *United States*, 284 U.S. 352, 358; *A. H. Bull SS Co.* v. *United States*, 105 F. Supp. 474 (S.D. N.Y.). Judge Learned Hand's opinion in the District Court, *N. S. Byornes & Son* v. *United States*, 298 Fed. 123 (S.D. N.Y.), that an owner could not sue under the Suits in Admiralty Act has been rejected.

as to achieve an equitable, consistent and dispositive result, tying up all loose ends, concluding all parties in interest, and fully adjusting their rights and liabilities. This advantage would be unavailable in the Court of Claims.

The District Court is, of course, the forum for both Suits in Admiralty Act and Public Vessels Act suits, and that fact provides another key to interpretation of these statutes. In view of the widespread awareness that, read together, the Suits in Admiralty Act and the Public Vessels Act, though not phrased in complementary terms, nonetheless form and were intended to form an integrated and entire system subjecting the United States to admiralty suits—providing two touching or overlapping nets for the reception and accommodation of litigation resulting from the operation of vessels by or for the United States[16]—it would be anomalous to find a major failure of coverage, and the United States less liable to suit in the admiralty courts when the vessels operated for it are carrying military or public cargo than when they carry commercial cargo.[17] It is unnecessary to

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[16] *State of Maine* v. *United States*, 134 F. 2d 574 (C.A. 1), certiorari denied, 319 U.S. 772; *United States* v. *Caffey*, 141 F. 2d 69 (C.A. 2); *Mejia* v. *United States*, 152 F. 2d 686 (C.A. 5), certiorari denied, 328 U.S. 862; *Thomason* v. *United States*, 184 F. 2d 105 (C.A. 9); *Olavarria & Co.* v. *United States*, 56 F. Supp. 758, 763 (S.D. Ala.); cf. *Canadian Aviator Ltd.* v. *United States*, 324 U.S. 215, 220-221; 59 Cong. Rec. 1680.

[17] After the decision of the Court of Appeals herein, the owner of a vessel chartered by the Maritime Commission for national defense purposes, in January 1942, for a round voyage to Red Sea ports was allowed to sue under the Suits in Admiralty Act in *A. H. Bull SS Co.* v. *United States*, 105 F. Supp. 474 (S.D. N.Y.) because she was loaded with a cargo of gen-

adopt the approach that between them the Suits in Admiralty Act and the Public Vessels Act cover the whole ground[18], so that there is no middle ground, in order to suggest the improbability that the important category of military-cargo-carrying merchant vessels operated for the United States could have gone unprovided for these many years (except in the Court of Claims on contractual claims only), and that until the Tort Claims Act in 1946 the only relief against the United States for a tort by such a "merchant vessel" chartered by the Government for general purposes and privately operated with merchant seamen would have been by way of an appeal to Congress for a private bill (cf. *United States* v. *Yellow Cab Co.*, 340 U.S. 543, 550, 552), or that, even today, because of the limited coverage of the Tort Claims Act, a private bill is the only remedy for a collision in a foreign country. See 28 U.S.C. 2680(k).

(d). There is another factor, of great importance to the United States, which argues for inclusion of cases like this within the Suits in Admiralty Act. One immediate purpose for the enactment of that Act was immunization of vessels from the seizure

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eral merchandise. Regarding the character of the particular cargo carried by privately owned and operated merchant vessels as decisive of admiralty jurisdiction yields such peculiar results.

[18] The Public Vessels Act may not cover all contract claims. Compare *Thomason* v. *United States*, 184 F. 2d 105 (C.A. 9) with *Eastern SS Lines* v. *United States*, 187 F. 2d 956 (C.A. 1); cf. *American Stevedores* v. *Porello*, 330 U.S. 446. Thus, the dovetailing may be imperfect if the Public Vessels Act fails to cover the range of claims comprehended within the Suits in Admiralty Act.

which had been held (*The Lake Monroe*, 250 U.S. 246) permissible under the Shipping Act of 1916 (*infra*, p. 40). *Canadian Aviator, Ltd.* v. *United States*, 324 U.S. 215, 219; *Clyde-Mallory Lines* v. *Eglantine*, 317 U.S. 395, 397; *Brady* v. *Roosevelt S.S. Co.*, 317 U.S. 575, 579; *Blamberg Bros.* v. *United States*, 260 U.S. 452, 458. Another impelling purpose was the extension of immunity from arrest and seizure to privately owned and operated vessels which were carrying cargo "for the United States." These purposes may well be defeated by the construction that a large gap in the system exists and that the important category of privately owned vessels, privately operated for the Government but carrying military cargo, may fall outside the system afforded by the two Acts and, not constituting public vessels (because not publicly operated), will become liable to arrest or seizure. Interference with vessels operated for the United States and carrying public cargo would clearly be more embarrassing to government operations than interference with such vessels carrying commercial cargo.

Other things being equal, a construction that does not impute to Congress a failure of purpose should be put upon the Suits in Admiralty Act, and any hiatus between the continuity of coverage of the Suits in Admiralty Act and Public Vessels Act, which would embarrass the dispatch of government business, should be held avoided. The statutory immunity from seizure conferred by Section 1 of the Suits in Admiralty Act (*infra*, pp. 40-41) is

probably limited to those vessels which are "employed as merchant vessels" as specified in Section 2 (*infra*, p. 41)—in view of the legislative history showing the limited objective of the Act (see Pet. Br., pp. 19-23), of the statutory arrangement with Section 2 referring back to Section 1 (*Burkholder v. United States*, 60 F. Supp. 700, 702 (E.D. Pa.) and see the opinion below, R. 803),[19] and of the improbability that Congress intended to immunize vessels from seizure under Section 1 without affording a compensating remedy for damages under Section 2.[20]

Of course, the force of this immunity-from-seizure argument should not be exaggerated. Seizure may be only an outside possibility, since the liability to seizure under the 1916 Act, *infra*, p. 40, enforcement of which was the immediate occasion for the Suits in Admiralty Act, only extended to vessels purchased, chartered, or leased from the Maritime Commission (now Maritime Administration); this would seem to exclude many, if not most, vessels operated or chartered by the United States (See Austin Tappan Wright, *Government Ownership and the Maritime Lien*, 7 Calif. L. Rev. 242, 258 (May 1919)), and it has been doubted that a vessel in the service of the sovereign on a time char-

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[19] Note particularly the declaration in Section 1 that the immunity from arrest or seizure is granted "in view of the provision herein made [in Section 2] for a libel in personam."

[20] If Section 1 is read independently of Section 2, privately operated vessels such as *Portmar* would be immune from arrest or seizure since they are "operated * * * for the United States," but a claimant could not sue under Section 2 because (under the decision below) the vessel was not "employed as a merchant vessel."

ter may be seized under the non-statutory maritime law. (*The Crimdon*, 35 T.L.R. 81, 82 (Prob., Divorce and Admiralty Division)). Nevertheless, the possibility that the purpose of immunizing such vessels may fail and that privately owned and privately operated merchant vessels chartered by the United States for general purposes may be seized, because their cargo consists of munitions of war or grain for distressed areas, instead of commercial cargo, puts in question the soundness of the interpretation of the court below.

In sum, the advantages all lie with jurisdiction in the District Court under the Suits in Admiralty Act and not with jurisdiction divided, somewhat precariously, between the District Court and the Court of Claims. It remains to show, more particularly, that the basic theory and the terms of the Act allow of this reading.

2. *General theory of the Suits in Admiralty Act.*

(a). This Court has given hospitable scope to the Suits in Admiralty Act. In *Shewan & Sons v. United States*, 266 U. S. 108, the Act was held applicable to a vessel which was laid-up but had previously been employed as a merchant ship. The Act was also held to give jurisdiction over a suit for a collision with a sunken wreck which had been employed by the Government as a merchant vessel before its loss. *Eastern Transportation Co. v. United States*, 272 U. S. 675. The same case held that the Act was not limited to cases where there would have been *in rem* liability but "also had a

wider effect and created a broader personal obligation of the United States, as the owner of an offending vessel, like that of a private owner, which might be enforced in admiralty by a libel *in personam* in cases where there was no basis for an action *in rem*" (276 U. S. at 212). *United States Shipping Board Emergency Fleet Corp* v. *Rosenberg Brothers & Co.*, 276 U. S. 202, 214, held that the Act furnished the "exclusive remedy in admiralty against the United States and the corporations on all maritime causes of action arising out of the possession or operation of merchant vessels," and therefore that no suit could be maintained outside of the Act against a suable Government corporation. *Johnson* v. *U. S. Shipping Board Emergency Fleet Corp.*, 280 U. S. 320, 325-327, extended this ruling to preclude all suits, under the Tucker Act or the common law, in federal or state courts, on maritime causes of action which are within the Suits in Admiralty Act. And in *Matson Navigation Co.* v. *United States*, 284 U. S. 352, 356-357, 359, the Court confirmed the exclusiveness of the Act and rejected a maritime suit brought in the Court of Claims.

We infer from this line of cases that (a) maritime suits against the United States involving merchant vessels are to be entered, if possible, in the federal District Courts, and (b) the term "employed as a merchant vessel" is not to be read in a cramped or too literal style.

(b). On the basis of these twin fundamental principles, as well as of the comparative advantages of jurisdiction under the Act (*supra*, pp. 18-29), it is not hard to interpret the proviso to Section 2 of

the Suits in Admiralty Act as covering cargo vessels privately operated *for* the United States, under time or voyage charters, regardless of the nature of the cargo. The owner earns hire from the United States for carrying the Government's cargo, and his vessel can therefore be easily said to be "employed as a merchant vessel." Certainly, it is not a public vessel since it is not operated by the United States (*supra*, p. 17), and it would be difficult to classify the ship at all, if one were to reject the idea that it is "employed as a merchant vessel." In ordinary speech, as well as in maritime parlance, a ship carrying cargo for hire is being used as a merchant vessel.

We know of nothing in the Act's legislative history contradicting this conclusion. In explaining the change in S. 3076, 66th Cong., 2d Sess., whereby the words "provided that such vessel is employed or intended to be employed in the carriage of cargoes or passengers for hire" were omitted and the words "provided that such vessel is employed as a merchant vessel or is a tugboat operated by such corporation" were substituted, the Conference Report (H. Rep. No. 669, 66th Cong., 2d Sess., p. 5; reprinted in 59 Cong. Rec. 3631 (Feb. 28, 1920)) said only that "The effect of this change is to exclude from the scope of the bill certain public vessels not employed as merchant vessels, but that occasionally carry persons and property for hire, and to make certain that tugboats employed as auxiliaries to the merchant fleet are made subject to the proposed act." This indicates that Congress was concerned with certain Government-owned or Gov-

ernment-operated vessels which might sometimes carry cargo for hire and still not be employed as merchant vessels. But there is no suggestion that privately-owned and privately-operated cargo-carrying ships would be regarded as employed as other than merchant ships.

(c). There is a somewhat narrower basis for sustaining jurisdiction here, *viz.*, the general character of the *Portmar* as a "merchant vessel." The *Portmar* was a general cargo carrier built in 1919 (R. 580, 703); she was included in the official list of *Merchant Vessels of the United States;* (see fn. 1, *supra,* p. 3); she was in merchant service when she was chartered by the Government, before entry into the war, under P.L. 101, 77th Cong., 55 Stat. 242, 50 U.S.C. App. 1273. Finally, her government charter was for trading, and the ship was to be manned by merchant seamen and operated by Calmar; and she was so operated at all times during the voyage in question. The fact is that she was employed as and retained her general character as a merchant vessel, notwithstanding that the Government as charterer may have availed itself of its option to ship military instead of commercial cargo.

In this view, employment as a merchant vessel looks to general character and permits the parties to dispense with over-particularized and nice inquiries into the details of operations at a given time.[21] To regard only the nature of the particular

[21] "If the vessel is earning her living in the merchant service, she is so employed within the meaning of this statute." *Adams v. United States,* 281 Fed. 895, 896 (D. Mass.).

cargo on the particular voyage as having any bearing on the jurisdictional status of the vessel is surely to abandon general guides that this Court has laid down under the Suits in Admiralty Act. "The words of the proviso [to Section 2] may reasonably and more libefally be interpreted as a limitation that the vessel is a merchant vessel and shall not have lost its character as such." *Shewan & Sons* v. *United States*, 266 U.S. 108, 113; see also *Eastern Transp. Co.* v. *United States*, 272 U.S. 675, 692. The employment and jurisdictional status of a vessel and the character of a continuous operation need not change overnight as cargo is loaded and unloaded, multiplying the inquiries and distinctions when the general employment remains unchanged.[22] Cf. *The Nishmaha*, 263 Fed. 959. (D. Ore.) (which may perhaps have been overruled on its specific facts by *The Western Maid*, 257 U.S. 419). Thus, in *Eastern Transp. Co.* v. *United States*, 272 U.S. 675, 692, the wreck case (*supra*, p. 29), this Court held that "What the statute means by saying 'employed as a merchant vessel', is that the vessel shall belong to that class as distinguished from one employed in the governmental service—not necessarily that it shall be actively thus employed at the time of the collision." See also *Adams* v. *United States*, 101 F. Supp. 956, 959 (D. Mass.).[23] This view is con-

[22] But see, as to the corresponding but unrelated problem in war risk insurance, *Larrinaga Steamship Co., Ltd.* v. *The King*, [1945] A.C. 246, 258 (H.L.).

[23] *Eastern SS Lines* v. *United States*, 187 F. 2d 956 (C.A. 1), affirming 91 F. Supp. 214 (D. Mass), is not opposed. There,

firmed by the difference in wording between the Suits in Admiralty Act and the Shipping Act of 1916 (*infra*, pp. 40-41). Under the latter, exclusiveness was specifically required ("solely as merchant vessels") and any blend or admixture contradicted employment solely as a merchant vessel. The Suits in Admiralty Act omits this requirement of absolute exclusiveness.

(d). *The Western Maid*, 257 U. S. 419, and the later cases on which the Court of Appeals relied (*supra*, pp. 14-16), do not bar these conclusions. In the first place, as noted above (p. 16), these decisions all involved public vessels, *i.e.*, vessels operated by the United States, and not ships privately owned and privately operated as cargo carriers for the United States. Moreover, *The Western Maid* construed the language of Section 9 of the 1916 Act, which had been interpreted to authorize seizure of vessels "employed solely as merchant vessels" (*The Lake Monroe*, 250 U. S. 246), and

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the United States agreed to make repairs, or pay for them, after use of the *Acadia* by the Army for a troop transport under a requisition charter. It was held that the court had no Suits in Admiralty Act jurisdiction over the owner's claim for reconditioning, for although the vessel was built as a merchant cargo vessel, the charter recited it was to make the *Acadia* available to the Army or Navy Departments for military use as a public vessel, and she was in fact used as a transport and hospital ship and then to carry dependents of service persons from the United States and troops to the United States. In holding that the claim did not arise out of employment in the merchant service, and that redelivery to the Maritime Commission for a short while pending redelivery to the owner did not cause a reversion to the former status, the court properly observed that the liability was an incident of employment as a public, not a merchant, vessel. The charter specified military use and she was so used.

the Court was doubtless concerned with the possibility that seizure or arrest might interfere with the public service or restrain or retard aid to distressed foreign areas following World War I (see (1952) 100 Univ. Pa. L. Rev. 689, 696). The possibility of arresting vessels operated for the United States, if employed as merchant ships is, of course, foreclosed by Section 1 of the Suits in Admiralty Act, and there is therefore no comparable need to read the Suits in Admiralty Act term—"employed as a merchant vessel"—narrowly.

On balance, we believe that it is better to determine the present issue by taking full account of the major purposes of the Suits in Admiralty Act and the consequences of denying jurisdiction under it, rather than by giving the widest possible reading, as did the court below, to the expressions in *The Western Maid, supra.*[24] It is submitted that the Suits in Admiralty Act, reasonably interpreted, and giving proper respect to the literal wording of the "employed as a merchant vessel" proviso to Section 2, is consistent with jurisdiction here, and that such an interpretation best comports with the "central purpose of the Act" (see *Johansen* v.

[24] It is permissible to take account of different consequences in construing the same or similar words: *Brooks* v. *United States*, 337 U.S. 49, 52-53; *United States* v. *Fisher*, 2 Cr. 358, 386, 390; cf. Mr. Justice Holmes, dissenting in *Kepner* v. *United States*, 195 U.S. 100, 134. And the dominant principle is always to consider the particular purpose and context of the words chosen by Congress. *Perrine* v. *Chesapeake & Delaware Canal Co.*, 9 How. 172, 190; *Puerto Rico* v. *Shell Co.*, 302 U.S. 253, 258; *United States* v. *Raynor*, 302 U.S. 540, 547-548; *United States* v. *Amer. Trucking Ass'ns*, 310 U.S. 534, 542; *Securities & Exchange Commission* v. *Joiner Corp.*, 320 U.S. 344, 350-351.

United States 343 U. S. 427, 431), best effectuates congressional policies, and best serves the interests of all litigants.

II

Petitioner's Other Questions Are Not Ready for Adjudication

Liability of the United States to the petitioner is sought provisionally (R. 779-781)[25] and in the alternative (R. 88), contingent upon the owner's inability to recover from the underwriters, who are the respondents in *Calmar Steamship Corporation* v. *Scott*, No. 303, this Term.[26] Furthermore, in addition to that element of contingency, the liability of the United States does not follow automatically from the non-liability of the underwriters but must be established independently on the basis of the obligations the Government assumed in the voyage charter. The question of the liability of the United States to petitioner is somewhat complex and involved, and is reached only (1) if the underwriters are not liable, and are found not to be liable by this Court, (2) if suit under the Suits in Admiralty Act may be maintained against the United States, and (3) as to the claim for hire, if the vessel was not a constructive loss[27] (R. 88).

[25] For charter hire until November 17, 1952 and indemnity. Calmar only appealed provisionally.

[26] The United States paid the premiums and, as in *Larrinaga Steamship Co., Ltd.*, v. *The King*, [1945] A.C. 246, 261-263 (H.L.), was both the charterer and the source from which military orders derived. In the *Larrinaga* case the charterer was relieved from responsibility for naval orders.

[27] The United States interposed four affirmative defenses to the claim for hire (R. 41-42).

The courts below had no occasion to consider the questions fully; the District Court because it held the underwriters liable [28] and the Court of Appeals because it found against jurisdiction under the Suits in Admiralty Act.

For the foregoing reasons, as suggested in the Memorandum for the United States on the petition for certiorari herein, in the event that jurisdiction is sustained and the liability of the United States is reached, this Court should not be asked to act as a court of first instance to consider the questions reserved in the petition for certiorari. They are dependent not only upon interpretation of the charter but upon contested issues of first impression, [29] upon controverted facts, [30] and examination and evaluation of the evidence. [31] This Court should remand the case for further proceedings, including the introduction of further evidence, on the correct jurisdictional premises. Cf. *Marconi Wireless Co.* v. *Simon*, 246 U. S. 46, 57; *Rosenthal* v. *N. Y.*

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[28] The district court did enter judgment against the United States for a small sum ($238.50) for victualling the supercargoes (R. 20, 152-153, 756) but since it found the underwriters liable and that the vessel was a constructive total loss, it denied the claim for hire (R. 756). It further held that the *Portmar* did not sustain any loss or damage which would render the United States liable under the charter (R. 756).

[29] See *Graham* v. *Brotherhood of Locomotive Firemen & Enginemen*, 338 U.S. 232, 237.

[30] See *Stringfellow* v. *Atl. Coast Line*, 290 U.S. 322, 326; *Gerdes* v. *Lustgarten*, 266 U.S. 321, 327; cf. *Cardillo* v. *Liberty Mutual Co.*, 330 U.S. 469, 474; *Standard Oil Co.* v. *United States*, 340 U.S. 54, 59.

[31] See *Kiefer-Stewart Co.* v. *Seagram & Sons*, 340 U.S. 211, 214; *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 143-144; *Manufacturers' Co.* v. *McKey*, 294 U.S. 442, 453-454.

Life Ins. Co., 304 U. S. 263; *Cities Service Co.* v. *Dunlap*, 308 U. S. 208, 211; *American Stevedores* v. *Porello*, 330 U. S. 446, 457-8; *Brooks* v. *United States*, 337 U. S. 49, 54; *Communications Comm'n.* v. *WJR*, 337 U. S. 265, 285. [32]

We note merely that the theory that the United States must be liable if the underwriters prevail in *Calmar Steamship Corporation* v. *Scott*, No. 303, is without merit. The Government made no such undertaking and none may reasonably be implied. The Government as charterer only agreed to pay for insurance (Art. 2.17, R. 35), not to stand liable as insurer. The liability of an insurer may not be interpolated into the charter by any tortured construction of the charterer's agreement to pay for war risk insurance. [33]

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[32] The contention (Pet. Br. 2, 43-45) that the United States is liable to petitioner (even though No. 303 is reversed and the underwriters held liable) for the benefit of the underwriters is plainly insubstantial, but that contention may also be remitted to the courts below.

[33] Art. 2.16 specifically provides against liability on the part of the charterer for acts of war or of public enemies, disproving liability as insurer (R. 34).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the cause should be remanded to the District Court with directions to consider the claims of the libelant under the charter in accordance with the Suits in Admiralty Act, taking into consideration the forthcoming decision of this Court in *Calmar Steamship Corporation* v. *Scott*, No. 303, this Term.

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JANUARY, 1953.

APPENDIX

1. Section 9 of the Shipping Act of September 7, 1916, 39 Stat. 730, 731, 46 U.S.C. 808, provides in pertinent part as follows:

> Every vessel purchased, chartered, or leased from the board shall, unless otherwise authorized by the board, be operated only under such registry or enrollment and license. Such vessels while employed solely as merchant vessels shall be subject to all laws, regulations, and liabilities governing merchant vessels, whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien, or other interest therein. * * *

2. The Suits in Admiralty Act of March 9, 1920, 41 Stat. 525, 46 U.S.C. 741, *et seq.* provides in pertinent part as follows (as it appears in 46 U. S. Code):

> § 741 [Sec. 1 of the Act]. *Exemption of United States vessels and cargoes from arrest or seizure*
>
> No vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions: *Provided,* That this chap-

ter shall not apply to the Panama Railroad Company. [Act of Mar. 9, 1920, c. 95, § 1, 41 Stat. 525.]

§ 742 [Sec. 2 of the Act]. *Libel in personam.*

In cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against any corporation mentioned in section 741 of this title, as the case may be, provided that such vessel is employed as a merchant vessel or is a tugboat operated by such corporation. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. The libelant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States and such corporation. In case the United States or such corporation shall file a libel in rem or in personam in any district, a cross libel in personam may be filed or a set-off claimed against the United States or such corporation with the same force and

effect as if the libel had been filed by a private party. Upon application of either party the cause may, in the discretion of the court, be transferred to any other district court of the United States. [Act of Mar. 9, 1920, c. 95, § 2, 41 Stat. 525.]

3. The Public Vessels Act of March 3, 1925, 43 Stat. 1112, 46 U.S.C. 781 *et seq.* provides in pertinent part as follows (as it appears in 46 U.S. Code):

§ 781. *Libel in admiralty against or impleader of United States*

A libel in personam in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States: *Provided,* That the cause of action arose after the 6th day of April, 1920. [Act of Mar. 3, 1925, c. 428, § 1, 43 Stat. 112.]

§ 782. *Venue of suit; application of provisions of chapter 20* [*i.e.*, the *Suits in Admiralty Act*]

Such suit shall be brought in the district court of the United States for the district in which the vessel or cargo charged with creating the liability is found within the United States, or if such vessel or cargo be outside the territorial waters of the United States, then in the district court of the United States for the district in which the parties so suing, or any of them, reside or have an office for the

transaction of business in the United States; or in case none of such parties reside or have an office for the transaction of business in the United States, and such vessel or cargo be outside the territorial waters of the United States, then in any district court of the United States. Such suits shall be subject to and proceed in accordance with the provisions of chapter 20 of this title [*i.e.*, the Suits in Admiralty Act] or any amendment thereof, insofar as the same are not inconsistent herewith, except that no interest shall be allowed on any claim up to the time of the rendition of judgment unless upon a contract expressly stipulating for the payment of interest. [Act of Mar. 3, 1925, c. 428, § 2, 43 Stat. 1112.]

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